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No. 95-1232

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

GENERAL MOTORS CORPORATION,

Petitioner,

v.

ROGER W. TRACY, Tax Commissioner of Ohio,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF COMMITTEE ON STATE TAXATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Committee On State Taxation ("COST") hereby respectfully requests leave to file the attached Brief as *Amicus Curiae* in Support of the Petition. COST is a non-profit trade association that was organized in 1969 as an advisory committee to the Council of State Chambers of Commerce. COST, which separately incorporated in 1991, has a membership of over 410 major multistate corporations, engaged in interstate and international business. COST has participated in several state tax cases before this Court, including *Reich v. Collins,* 115 S. Ct. 547 (1994), where COST's *amicus* brief presaged the Court's ultimate ruling. The interest of COST as *amicus curiae* is described in greater detail *infra* at Brief, pp. 1-2.

Counsel for respondent has refused to consent to the filing of a brief in support of petitioner, even though it has consented to the filing of an *amicus* brief in support of respondent.

There are compelling reasons for granting COST's motion. First, with respect to the petition filed in this case, COST wishes to address the Commerce Clause implications of the specific Ohio Supreme Court ruling under review. A full exposition of the controversy and the potential ramifications of this case for other taxpayers will benefit this Court. Indeed, COST is informed that an *amicus* brief *opposing* the petition is to be filed in this case; counsel for both petitioner and respondent have consented to that filing.

Second, the member companies of COST are more generally concerned with the ability of state courts to faithfully apply the constitutional limitations on state taxation in a responsible fashion. COST has monitored such state court decisions for years, and is uniquely qualified to comment on this question.

Wherefore, COST respectfully requests that this Court grant its Motion for Leave to file this brief *amicus curiae.*

Respectfully submitted,

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BRIEF OF COMMITTEE ON STATE TAXATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

INTRODUCTORY STATEMENT

This brief is submitted by the Committee On State Taxation as *amicus curiae* in support of petitioner General Motors Corporation.

INTEREST OF *AMICUS CURIAE*

The Committee On State Taxation ("COST") is a non-profit trade association that was organized in 1969 as an advisory committee to the Council of State Chambers of Commerce. COST, which separately incorporated on December 11, 1991, has a membership of over 410 major multistate corporations, engaged in interstate and international business. COST's objective is to preserve and promote the equitable and nondiscriminatory state and local taxation of multijurisdictional business entities. In furtherance of that objective, COST has filed *amicus* briefs in

several of this Court's state-tax cases, including *Reich v. Collins*, 115 S. Ct. 547 (1994).

Many of COST's members are engaged in business in the State of Ohio and thus have a particular interest in the ultimate disposition of the use tax exemption scheme at issue in this case. In addition, the entire membership of COST has a vital interest in ensuring that states do not impede, through discriminatory taxes, the rights of all purchasers to engage in commerce in the national market. The Ohio tax scheme at issue in this case, like similar schemes currently in place in other states, impedes purchasers' access to the national market by exempting sales by local businesses, but taxing out-of-state sales. That is precisely the sort of parochial favoritism that COST opposes, and that the Commerce Clause forbids.

STATEMENT

This case involves Commerce Clause and Equal Protection Clause challenges to an Ohio sales and use tax exemption scheme. That scheme encourages buyers to purchase their natural gas requirements locally, by exempting from tax purchases of natural gas from local public utilities while taxing purchases out of state. Petitioner, which purchased its gas requirements outside of Ohio, was therefore required to pay a tax which would not have been assessed had it purchased the identical gas from an Ohio public utility.

REASONS FOR GRANTING THE WRIT

By their very nature, states have a tendency to favor their own industries over those of other states. This Court's decisions illustrate this principle. Recently, Massachusetts decided to favor its milk farmers by funding a subsidy for them out of a tax on all milk sold in that Commonwealth. *See West Lynn Creamery, Inc. v. Healy*, 114 S. Ct. 2205 (1994). Hawaii favored its local liquor producers by exempting particular native beverages from excise tax. *See Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). Over a century ago, Virginia was favoring its local butchers by requiring stringent inspections of, and imposing fees upon, only

meat imported from afar. *See Brimmer v. Rebman*, 138 U.S. 78 (1891). Each of these examples of state favoritism has one other thing in common: Each was held to violate the Commerce Clause of the United States Constitution.[1]

The questions raised by the Petitioner in this case merit this Court's review for several reasons. For one, the discrimination perpetrated by the Ohio use tax exemption scheme against COST members and other companies engaging in interstate purchases of natural gas for use in their Ohio manufacturing operations would by itself serve as a sufficient ground for granting a writ of certiorari. However, the questions raised in this case transcend the discriminatory impact of an unconstitutional tax on industry operating within one state.

The same sort of mischief worked by the Ohio scheme is present in other states as well. In *Tug Buster Bouchard Corp. v. Wetzler*, 635 N.Y.S.2d 803 (N.Y. App. Div. 1996), the New York Appellate Division struck down New York's petroleum business tax as violative of the Commerce Clause. That tax was imposed only "upon the purchasers and consumers of imported petroleum," *id.* at 805, but not upon purchasers and consumers of petroleum sold by New York businesses. Fortunately, the New York courts — unlike the Ohio court here — recognized the national market guaranteed by the Commerce Clause. The New York tax — where "in-State sellers of domestic petroleum remain benefited while petitioners [purchasers of out-of-state petroleum] and those similarly situated remain burdened" — was held to be unconstitutionally discriminatory. *Id.*[2] We can see no principled

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[1] Such discrimination against out-of-state interests would, as the Petition explains (Pet. 15), also violate the Equal Protection Clause. *See Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985).

[2] The Appellate Division perceived no "standing" problem with petitioners, who were *purchasers* of out-of-state petroleum, raising this Commerce-Clause argument, which highlights the Ohio court's further error in this regard. *See* Pet. App. 4a; Pet. 11-14.

distinction to be drawn between *Tug Buster Bouchard* and the present case.

There are also striking similarities between this case and the discriminatory state tax scheme recently struck down by this Court in *Fulton Corp. v. Faulkner*, 64 U.S.L.W. 4088 (U.S. Feb. 21, 1996). There, North Carolina tried to give its own corporations a similar "home-field" advantage. The more of the corporation's business that was done in North Carolina, the less the stock was taxed. A unanimous Court concluded that "[t]here is no doubt that the intangibles tax facially discriminates against interstate commerce." *Id.* at 4091. *Even "[t]he Secretary [of Revenue] practically concede[d] as much."* *Id.* (emphasis added). Just as in *Fulton Corp.*, the tax exemption scheme at issue here favors only those who keep their business in-state; just as in *Fulton Corp.*, the decision here should not be permitted to stand.[3]

The Ohio Supreme Court's decision has serious potential to distort the national market for the sale of all goods, not just natural gas. The Commerce Clause, and to a similar extent the Equal Protection Clause, guarantees both merchants and buyers that state borders will be largely irrelevant to purchasing decisions. Thus, a buyer such as GM in this case should be assured that a taxing state will tax its purchases of goods *without regard* to where that purchase is made. But here, since GM did not purchase its natural gas requirements from a favored Ohio public utility, it paid a hefty tax. That unvarnished "home-field"

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[3] It is also worth noting that the Court's decision in *Fulton Corp.* conflicts with the Ohio court's bizarre "standing" ruling. (*See* Pet. 11-14) The petitioner in *Fulton Corp.* was a corporation which owned stock in out-of-state corporations. Neither the North Carolina courts, nor this Court, even paused to consider whether Fulton Corporation had "standing" to challenge a law which drew distinctions based on the residence of the *issuers* of the stock certificates, not the *owners* (such as Fulton). 64 U.S.L.W. at 4089-90.

advantage is unconstitutional discrimination worthy of this Court's review.

COST believes that the most significant aspect of this case lies not in the existence of a plethora of identical or similar use tax exemption schemes for natural gas in other states, but in its jurisprudential justification for discriminatory state tax schemes that favor in-state commerce to the detriment of interstate commerce. Analogous exemption and taxation schemes that favor in-state commerce over interstate commerce have been overturned by this Court in many Commerce Clause decisions. Such decisions leave no room for discrimination, yet state courts persist in attempting to carve out exceptions for their own transgressor statutes. Here, the Supreme Court of Ohio held that the placement of a degree of burden on *some* in-state purchases of natural gas somehow neutralizes the comprehensive burden on *all* interstate purchases of gas. This Court cannot tolerate such a result without permitting the enervation of a critical line of Commerce Clause jurisprudence.

Because the Tax Injunction Act, 28 U.S.C. § 1341 (1994), bars relief to taxpayers in federal court, state tax cases as a practical matter can only be litigated in state court. These state courts are often unsympathetic to federal constitutional challenges to important sources of state revenue. Based on the long experience of COST and its members in this area, decisions such as this — if left unreviewed — will encourage Ohio and other states to disregard the Commerce Clause in a wide variety of contexts.

CONCLUSION

For the reasons set forth above, the Committee On State Taxation respectfully requests that the Court grant a writ of certiorari and reverse the decision of the Supreme Court of Ohio.

Respectfully submitted,

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